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STATE OF WASHINGTON,

Respondent,

v.

DESMOND MODICA

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny the petition for review.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Modica, 149 P.3d 446, 2006 WL 3772307 (filed December 26, 2006).

C. STATEMENT OF THE CASE

The relevant facts are set forth in the briefing before the Court of Appeals.

D. ARGUMENT

1. THE COURT SHOULD DENY THE PETITION FOR REVIEW.

The Court should deny Modica's petition for review. The State fully responded to the issues originally raised by Modica in his direct appeal, and those responses will not be fully repeated here. The Court of Appeals correctly held that the Washington Privacy Act does not apply to recorded conversations between jail inmates and the recipient of a telephone call from that inmate both because

the calls are not private, and because both parties consented to the recording of the calls.

The issues raised by Modica in his petition do not qualify for review under RAP 13.4.

The State submits this answer to point out an additional reason to deny Modica's petition: he attempts to raise a new issue that was not argued or presented to the Court of Appeals. Modica claims that the Court of Appeals' decision is in conflict with two decisions of this Court: State v. Wanrow, 88 Wn.2d 221, 551 P.2d 548 (1977), and State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996). However, Modica fails to mention in his petition for review that the statute which this Court interpreted in Wanrow was repealed. Before 1977, former RCW 9.73.090(1) provided:

The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police and fire personnel in the following instances:

(1) Recording incoming calls to police and fire stations for the purpose and only for the purpose of verifying the accuracy of reception of emergency calls.

Thus, Wanrow interpreted a different statute than Faford. There is no conflict between the two decisions.

This Court interpreted the statute literally to preclude the use of the law enforcement recordings except for verification purposes.

Wanrow, 88 Wn.2d at 232-33. The legislature responded to this Court's interpretation by deleting the verification clause and amending the chapter to remove the bar against recordings obtained from emergency fire and police telephone lines. Laws of 1977, ex. sess., ch. 363, § 3. Thus, the 1977 amendments "[e]ffectively have nullified Wanrow with respect to RCW Ch. 9.73." State v. Bonilla, 23 Wn. App. 869, 873-75, 598 P.2d 783 (1979); see also Wash. AGO 1980 No. 20, 1980 WL 99830. Consequently, the Court of Appeals' decision in Modica cannot conflict with a case (Wanrow) that interpreted a statute that was subsequently repealed.

Nor does the Court of Appeals' decision conflict with State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996). In Faford, a citizen secretly listened to a neighbor's telephone communications via radio scanner. This Court held "[t]hat the mere possibility that intrusion on otherwise private activities is technologically feasible does not strip citizens of their privacy rights." Id. Here, there was nothing surreptitious about the recordings—both participants knew that their conversations were being recorded, and consented to such recordings. State v. Modica, 149 P.3d 446, 454-55, 2006 WL 3772307.

This Court should deny Modica's petition and reject his attempt to raise a new issue for the first time in his petition for review.

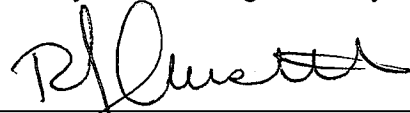
E. CONCLUSION

The Court should deny Modica's petition.

DATED this 6 day of February, 2007.

Respectfully submitted,

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Answer To The Petition For Review, in STATE V. DESMOND MODICA, Cause No. 797676, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington



Date